IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No. 3693 of 2006
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For Approval and Signature:

HONOURABLE MR.JUSTICE D.H.WAGHELA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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NILESH C.VAISHNAV - Applicant(s)
Versus
THE STATE OF GUJARAT & 1 - Respondent(s)

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Appearance :
MR BB NAIK for Applicant(s) : 1,
MR.LB DABHI APP for Respondent(s) : 1,
MR GOPESH J SONI for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE D.H.WAGHELA

Date : 10/10/2007

ORAL JUDGMENT

1. The petitioner, a chartered accountant, has invoked the provisions of Section 482 of the Code of Criminal Procedure, 1973 (for short, “the

Code”) for a direction to quash the criminal proceedings in Criminal Cases No.3837,3382,3056 and 3057 of 2002 pending in the Court of learned Metropolitan Magistrate, Court No.4, Ahmedabad. He was joined as one of the accused persons in the complaints filed by respondent No.2-Bank exclusively alleging offence under Section 138 read with Sections 141 and 142 of the Negotiable Instruments Act, 1881 (for short, “the Act”). It is alleged in each complaint that accused No.1 was a Company incorporated under the Companies Act, 1956, accused No.2 was Manging Director and accused Nos.3 to 9 were Directors of the said company. It is alleged that the accused had given cheques in favour of the complainant towards payment of its dues. The earliest cheque, according to the complaint, is dated 29.06.2002 for Rs.12,04,679/-. Thereafter, the following cheques were given to the complainant;

1. Cheque dated 03.08.2002 for Rs.1,67,00,000/-,
2. Cheque dated 03.09.2002 for Rs.1,67,00,000/-
3. Cheque dated 30.09.2002 for Rs.1,66,00,000/-
4. Cheque dated 30.09.2002 for Rs.04,99,589/-
5. Cheque dated 01.10.2002 for Rs.2,600/-

When the cheques were presented for realization

on 23.10.2002, they are alleged to have been returned unpaid for the reasons stated to be “Exceeds Limits” and “Signatory not authorised to draw”. It is specifically alleged that accused No.1, i.e. the company, had duly authorised the signatory, i.e. accused No.10, vide its resolution dated 01.10.2002 to draw cheques and all the accused were very well aware about the cheques drawn by accused No.10 in favour of the complainant. It is also alleged in the complaint that the accused persons had not paid the amount of the cheques in question within 15 days of the receipt of statutory notice.

2. It is specifically averred on oath in the petitions by the petitioner that he was a practising Chartered Accountant who was inducted in accused No.1-Company in the year 1995 as a Professional Director to meet one of the requirements of sanction of the loan of IDBI and was never responsible for day-to-day affairs of the company or the business of the company. As against the financial assistance extended by the complainant, six cheques drawn on State Bank of India and handed over towards principal amounts and five cheques drawn towards interest were signed by the authorised signatory of the company and issued to the complainant. Thereafter, by letter dated 25.06.2002, the company cancelled earlier cheques and issued new cheques on

25.06.2002 which were returned with the memo dated 24.10.2002. It is averred that notice dated 31.10.2002 issued to the petitioner pursuant to return of the cheques was not served upon him but served at the address of the company and not received by him. It is also stated in the complaint itself that notice issued to accused Nos.5 to 9 were returned with postal remarks “Not available and Left”

2.1. It is stated in the petition that the petitioner has tendered his resignation to the Chairman and Managing Director of the Company, accused No.2 in the complaint, by letter dated 30.05.2002 which was received by him on 31.05.2002 and the company had submitted Form No.32 before the office of the Registrar of Companies intimating change in the composition of the Board of Directors, stating that the applicant had resigned as a Director of the Company with effect from 07.06.2002. Copies of resignation and Form No.32 submitted to the office of the Registrar of Companies intimating change in the composition of the Board of Directors under the signature of the Company Secretary are annexed with the petition.

3. On the basis of the above facts and pleading, it was argued by learned counsel Mr.B.B. Naik, appearing for the petitioner, that

the criminal cases, as far as the petitioner was concerned, were required to be quashed, in absence of any specific averment in the complaint about involvement of the petitioner in the alleged offence and in view of the clear and un-controverted factual position of the petitioner not being a Director at the relevant time. It was further submitted that in absence of any other averment or allegation in the complaint, the petitioner was implicated in the criminal cases only on the basis that he was a member of the Board of Directors and once it was established that he was not holding such position at the relevant time or even at the time when the cheques were issued, criminal proceedings against him would be unsustainable and would amount to abuse of the process of law. Learned counsel Mr.Naik relied upon the judgment of the Hon'ble Supreme Court in **K. Srikanth Singh V/s. M/s. North East Securities Ltd. & Anr. [JT 2007(9)SC 449]** wherein it was contended that at the relevant point of time, the petitioner was not the Director of the company. After reference to the judgment of three Judges Bench of the Supreme Court in **S.M.S. Pharmaceuticals Ltd. V/s. Neeta Bhalla and Another**, it is observed in paragraph 5 that negotiation for obtaining financial assistance on behalf of the company by its Directors itself would not be an ingredient for the purpose of constituting an offence under

Section 138 of the Act. Furthermore, vicarious liability on the part of a person must be pleaded and proved. It cannot be a subject matter of mere inference. Thus, in similar circumstances, the order taking cognizance of offence was quashed, according to the submission.

4. Learned counsel Mr.Gopesh Soni, appearing for original complainant, submitted that involvement of the petitioner in the alleged offence would be a matter of evidence and the complainant proposed to prove that the petitioner was involved in the management of the accused company and also involved in the commission of the offence. He further submitted that the fact of resignation from the company could be proved in defence of the petitioner in the trial court but could not be relied upon at this stage for quashing the complaint against him. He further submitted that the resignation appeared to have been tendered by the petitioner and accepted by the company for the purpose of avoiding criminal liability and their exact dates could not be ascertained at this stage. However, it was fairly conceded that neither any affidavit-in-reply controverting the averments made in the petitions was filed nor was it proposed to be filed nor was an enquiry made with the office of the Registrar of Companies to find out the exact date of resignation and retirement of the

petitioner.

5. In the above facts, in absence of any controversy being raised even by a bare denial of the averments made in the petitions, the Court has to proceed on the basis that the petitioner had resigned from the Board of Directors of the accused company long before the cheques were issued to the complainant and returned by the bank to constitute the offence under Section 138 of the Act, as far as the petitioner was concerned. Therefore, accepting and relying upon un-controverted statement in the petition that the petitioner had resigned as Director and retired from the Board of Directors with effect from 07.06.2002 and in absence of any specific allegation against the petitioner implicating him in the criminal case as a Director of the Company, the petitions for quashing the criminal proceedings as against him have to be allowed since no purpose would be served by carrying on criminal proceeding against the petitioner in which there would be no chance of his conviction.

6. Accordingly, the petitions are allowed and the criminal proceedings in Criminal Cases No.3837,3382,3056 and 3057 of 2002 as far as the petitioner is concerned are quashed. It was stated at the bar that even after clarification by an order of this Court that the interim relief

granted against further proceeding was limited in its operation only as far as the petitioner was concerned, the trial had not proceeded further. Therefore, it is clarified that, since the present petitions are allowed and the proceedings against the present petitioner are quashed, the criminal cases as against other accused persons shall be proceeded as expeditiously as practicable in accordance with law. Rule is made absolute accordingly in each of the petitions with no order as to costs.

(D.H.WAGHELA, J.)

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